

The Cycle: Ethics and Domestic Violence Training for Prosecutors

By
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Ethics: The Movie III

- Arizona Rules of Professional Responsibility
- National Prosecution Standards
- Program designed for thinking and discussion

Commentary

A.R.P.C. 3.8 Commentary (1)

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and rectify the conviction of innocent persons."

Crawford Issues

- Crawford v. Washington 541 U.S. 36 (2004) Out of court statements by witnesses that are "testimonial" are barred, under the Confrontation Clause, unless the witnesses are unavailable and defendants had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the court.

Crawford Issues

- Crawford v. Washington 541 U.S. 36 (2004) "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."

Crawford Issues

- Davis v. Washington 547 U.S. 813 (2004) Statements are not *testimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an on-going emergency.

Crawford Issues

- Davis v. Washington 547 U.S. 813 (2004) Statements are *testimonial* when circumstances objectively indicate that there is no on-going emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant in later prosecution.

First 911 Call

- "Send the police. I need help."
- "He's looking for his keys. I hid them because he's drunk."
- "Please hurry!"
- Crash... Crash... "Who you talking to... Hang up the damned phone Laura!"

Second 911 Call

- "He's done it again. Please send the police."
- Is he still there? "No. He left."
- What do you mean, he's done it again? "He hit me!.. He tried to kill me!"

Police Interview

- I hid his keys... "He backhanded me across the face and pinned me against the wall and started choking me."
- "I couldn't breathe and must have blacked out. When I came to he was gone... That's when I called the police... He's really drunk. I'm afraid he could hurt somebody."
- No medical care needed. "I'll be fine."

Mandatory Arrest

- Historically, police officers used "mediation" to respond to domestic violence calls.
- In 1984, a study conducted in Minneapolis found arrest to be associated with lower recidivism when compared to mediation or couple separation options (Sherman & Burk).
- Within five years of the study, 84% of major police departments had adopted a policy that encouraged or mandated arrest (McFarland, Wilson, Lemmey, & Malecha, 2000).

Mandatory Arrest

- National Institute of Justice conducted replication study and found arrest better than other options as a deterrent, but only with certain types of offenders (Maxwell, et al, 2001).
- Arrest is more effective with offenders who have something to lose (e.g., job)
- Arrest is less effective with offenders with criminal histories

Mandatory Arrest

- Mandatory arrest policies were pushed in the 1980s because arrest rates were in the single digits.
- Research shows that arrest now occurs in up to ¾ of DV cases (Hirschel, et al, 2007)
- Arrest rates have increased since mandatory arrest, but there is unintended negative of victims being arrested.
- Between 1987 and 2000, Deleon-Granados et al (2006) found that the arrest of women increased from 5% to 18% of DV arrests

Mandatory Arrest

- Some are now concerned that peace officers are disempowered by being unable to arrest based upon discretion; they act to comply with departmental policies and to avoid civil liability associated with not making an arrest.
- Advocates concerned that victims disempowered by having no influence on arrest based on their knowledge of his danger.

Victim Care

- Encourage officers to call EMS to the scene
 - (1) creates another witness to injuries, emotional state, crime scene status
 - (2) When choked to unconsciousness, this creates a substantial risk of death or serious physical injury

Subpoena to Office?

- A subpoena is “a writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.”

Respect for Rights of Third Parties

- A.R.P.C. 4.4(a)
A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such person.

Screening Cases

- National Prosecution Standards 4-1.1
The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows law enforcement to charge, the prosecutor should decide whether charges should be pursued at the earliest time possible.

Truthfulness to Others

- **A.R.P.C. 4.1**

(a) While representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person;

Prosecution Policy

- In 1970s and 80s, advocates were concerned about low rates of prosecution, estimated to be less than 10% of cases (Fagan, 1989; Sherman, 1992); and high dismissal rates
- Early research suggested prosecutors were anticipating that victims would want charges dropped, and they did not view DV as serious (Davis & Smith, 1982)
- Wooldredge (2007) found that convicted offenders were 7x's less likely to be recharged compared to those with dismissals

Prosecution Policy

- No drop prosecution policies were intended to increase the number of cases prosecuted
- Also intended to unburden victims from retribution of abusive partners angered by being prosecuted (Ford, 2003).
- No-drop policies have increased the number of cases prosecuted, but not all jurisdictions report higher percentage of convictions (Goodmark, 2011)

Prosecution Policy

- Studies also find increase in the time it takes for cases to be prosecuted, decreased satisfaction among victims, and increase in pre-trial crime against victims (Davis, Smith, & Taylor, 2003)
- No-drop policies can increase the number of victims who recant their testimony as they are pressured to participate in an action they believe to be unsafe (Goodmark, 2011)

Prosecution Policy

- Studies show that victims who file charges under a drop-permitted policy are less likely to experience additional abuse from the offender
- Use the strengths of all models
- Consider the victim's knowledge of the offender dynamic and risk
- Utilize Victim's Advocates to do safety planning with the victim
- Evidence collected in "victimless prosecution" style.

Victim Issues

- Minimization vs. Recantation
- Victims minimize as a coping mechanism- Don't want to disclose the most embarrassing thing- this can be problematic for the case
- Victims entitled to protective order information but be aware of all the real issues
- Victim Advocate safety planning: Other protection services- notification, cell phone programs, shelter, witness protection

Victim's Rights

- **Nat. Prosecution Standards 2-9.1**
Victims of violent crimes, serious felonies, or any actions where it is likely the victim may be the object of physical or other forms of retaliation should be informed of all important stages of the criminal justice proceedings to the extent feasible, upon request or if required by law, including:

Victim's Rights

- **Nat. Prosecution Standards 2-9.1**
 - a) rejection of case or filing charges
 - b) determination of pre-trial release
 - c) Pre-trial disposition of the case
 - d) results and dates of trial and sentencing
 - e) any proceeding that could result in reversal, parole, release, or escape of the defendant
 - f) any other event that may put the victim at risk.

Prosecutor Duty to be Neutral

- The prosecutor has three distinct duties or responsibilities under our system:
 - (1) The public
 - (2) The victim
 - (3) The defendant

Spousal Privilege

- **Spousal Testimony:** The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of the marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

Spousal Privilege

- **Marital Communication:** An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage.

Spousal Privilege

- **Exception:** There is no privilege under this rule in any proceeding in which one spouse is charged with wrongful conduct against (a) the person or property of the other; (b) a minor child of either; (c) an individual that resides in the household of either; (d) third persons, if done in the course of wrongful conduct against any of the above.

The Brady Rule

- **Brady v. Maryland 373 U.S. 83 (1963)**
"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Special Responsibilities

- **A.R.P.C. 3.8**
(d) A prosecutor shall make timely disclosure of all evidence or information known to the prosecutor that tends to negate guilt or mitigate the offense, and for sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor, unless relieved by a protective order of the tribunal.

Special Responsibilities of the Prosecutor

- **A.R.P.C. 3.7**

A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness...

Options?

Victim Issues

- Use of subpoena
- Neutral approach of prosecutor
- Continued disclosure

Recanting Victims

- For many victims, the court system is an unfriendly place, adversarial by nature. Its proceedings leave them with little control and expose them to offenders they wish to escape (Jordan, 2004)
- Victims are asked to recount violent episodes, not in a supportive safe environment or therapy session, instead must face cross examination by one disputing their memory and credibility. (Jordan, Nietzal, Walker & Logan, 2004)

Recanting Victims

- Fear of retaliation from the offender
- 27% of offenders arrested on victim complaints re-assaulted the victim prior to trial (Ford & Regoli 1998)
- Bachman (1998) found that 10% of victims who did not report victimization to police said they did not because they feared reprisal by offender
- Women often seek court action at the time they physically separated from the relationship, and there is substantial evidence that this is the point at which they are at greatest risk of harm by offender

Recanting Victims

- Lack of social support by family or friends and abuse severity have a significant impact on a victim's ability to follow through with prosecution (Bennett et al, 1999)
- Financial realities
- National Crime Victimization Survey (NCVS) has found a intimate partner violence rate 5 times higher for lowest earning households (Greenfield et al, 1998)
- A longitudinal study following women after leaving DV shelter found that women with the least financial resources are most likely to be re-abused (Bybee & Sullivan, 2005)

Prosecution Policy

- "Victimless prosecution" is often closely related to no-drop policies, that has evolved from victims' reluctance to prosecute
- Also known as evidence-based prosecution, they rely on physical evidence (e.g., photos, damaged property, bloody clothing) and the testimony of third parties to support the charges (Fulkerson & Patterson, 2006)

Prosecution Policy

- Investigations in evidence-based prosecutions operate much like homicide investigations in that there is no assumption that the victim will testify (Ellison, 2002)
- Also rely on statements victim made at scene using exception to hearsay rule [e.g., excited utterance, present sense impression, statements made to medical personnel,

Candor Towards the Tribunal

- A.R.P.C. Rule 3.3
(d) In an ex parte proceeding, a lawyer **shall** inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Special Responsibilities of the Prosecutor

- **A.R.P.C. 3.8**

(a) The prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

Integrity of the Profession

- **A.R.P.C. 8.2**

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the **qualifications or integrity** of a judge...

Pretrial Publicity

- **A.R.P.C. 3.6**

(a) A lawyer participating or who has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Pretrial Publicity

- **A.R.P.C. Rule 3.8 (f)**

Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . .

Special Responsibilities of the Prosecutor

- **A.R.P.C. Rule 3.8(f)**

... and exercise reasonable care to prevent investigators, law enforcement, or employees or others assisting from making extrajudicial statements the prosecutor would be prohibited from making under Rule 3.6 or this rule.

Non-Lawyer Duties

- **A.R.P.C. 5.3**

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Supervising Lawyer

- **A.R.P.C. 5.3**

(c) A lawyer shall be responsible for such person's violation if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct; or
- (2) the lawyer has direct supervisory authority over the person, and knows of the conduct at time when consequences could be avoided or mitigated but fails to take reasonable remedial action.

Screening Cases

- **National Prosecution Standards 4-1.1**

The decision to initiate a criminal prosecution should be made by the prosecutor's office. Where state law allows law enforcement to charge, the prosecutor should decide whether charges should be pursued at the earliest time possible.

Screening Cases

- **National Prosecution Standards 4-1.2**

The chief prosecutor should recognize and emphasize the importance of the initial charging decision and should provide appropriate training and guidance to prosecutors regarding the exercise of their discretion.

Screening Cases

- **National Prosecution Standards 4-1.3**
The prosecutor should exercise discretion in screening to eliminate matters from the criminal justice system that are not justified or not within the public interest.

Factors to Consider

- **National Prosecution Standards 4-1.3**
 - a. Doubt as to the suspect's guilt;
 - b. Insufficiency of admissible evidence;
 - c. The negative impact on the victim;
 - d. Availability of adequate civil remedies
 - e. Availability of suitable diversion and rehabilitative programs;
 - f. Provisions for restitution;
 - g. Likelihood of prosecution by another jurisdiction;

Factors to Consider

- **National Prosecution Standards 4-1.3**
 - h. Aid to other prosecution goals or investigations through non-prosecution;
 - i. Charging decision in similar cases;
 - j. The attitude and mental status of the def;
 - k. Undue hardship caused to the accused;
 - l. A history of non-enforcement of the applicable violation;
 - m. Failure of law enforcement to perform necessary duties or investigation;

Factors to Consider

- National Prosecution Standards 4-1.3

- n. The expressed desire of the accused to release potential civil claims against victims, law enforcement and their personnel, and prosecutors, after advice from counsel and if knowing and voluntary;
- o. Whether the crime is a departure from the defendant's usual law abiding life;
- p. Whether the accused has already suffered major financial loss;
- q. Loss too small to warrant prosecution.

Factors Not to Consider

- National Prosecution Standards 4-1.4

- a. Prosecutor's rate of conviction;
- b. Personal advantages the prosecution may bring to the prosecutor;
- c. Political advantages to the prosecutor;
- d. Factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime;
- e. The impact of potential asset forfeiture.

Victim Issues

- In many states crime "victims" have the right to be consulted and informed of any plea agreement offered the defendant.

Ineffective Counsel

- [Missouri v Frye](#) 132 S.Ct. 1399 (2012)

Where counsel does not relay the offer, the defendant must show:

(1) That he would have accepted the more favorable offer and (2) that neither the prosecutor nor the court would have rejected the acceptance and the more favorable plea would have been entered.

Ineffective Counsel

- [Laffer v. Cooper](#) 132 S.Ct. 1376 (2012)

Where counsel acts "ineffectively" and talks the defendant out of accepting a favorable offer prior to getting slammed at trial the defendant must show: (1)

That but for his counsel, he would have accepted the more favorable offer and that the prosecutor and court would have approved the plea and (2) the plea would have been better than the verdict and sentence imposed.

Remedy

- If the defendant shows ineffectiveness and prejudice, the court has the discretion to give the defendant the initial offer or impose the trial verdict or anything in between.

Recommendation

- The offer's terms and processing can be put on the record.
- Make the offer in writing.
- State the offer to the court on the record and the Court asks the defendant to confirm that he was not advised to reject the offer, it was the defendant's decision.

Conflict of Interest

A.R.P.C. 1.18

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal the information, except as Rule 1.6 or 1.9 would permit with respect to info of a former client.

Conflict of Interest

• A.R.P.C. 1.18

- (c) A lawyer subject to (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received info from the prospective client that could be significantly harmful to that person in the matter...

Conflict of Interest

- **A.R.P.C. 1.10**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9...

Conflict of Interest

- **National Prosecution Standards 1-3.4**

Prosecutors should establish procedures for handling conflicts of interest, including: a) The creation of firewalls and taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose info; b) Methods to accurately document the manner in which conflicts are handled to ensure public trust and confidence.

Competency

- **A.R.P.C. 1.1**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Reporting Misconduct

- **A.R.P.C. Rule 8.3 (a)**

A lawyer who knows that another lawyer has committed a violation of A.R.P.C. that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Weighing the Evidence

- Charge before investigation complete?
- Victim pressure
- Public pressure
- Know that things can change dramatically when all witnesses have been interviewed and the scientific proof is complete
- Always keep investigating- Build the case!

Deal?

- **Maddawg:** I need to know that you're gonna let the Feds know I helped you out... I'm gonna help them out, but I thought you could let them know I helped you out too.
- **Tom:** Well, let's hear it Maddawg. If it's anything useful, I'll let the U.S. Attorney's Office know that you helped us.

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Exculpatory Information

- *Giglio v. United States*, 405 U.S. 150(1972) When the reliability of a witness may well determine guilt or innocence, nondisclosure of evidence affecting credibility falls within the "Brady" rule.
See also *U.S. v. Bagley*, 473 U.S. 667 (1985).

Value of the Information

- Conditioned information on getting favor
- Charged with gun trafficking, making snitch deal in her own case
- Victim used to beat her all the time, she got tired of it and shot him
- No struggle for the gun, she told him shut up and shot him until dead.
- Emptied whole gun in him
- No self-defense claim

Keep Investigating

- New statement from Sam
- New statement from Maddawg
- Autopsy results

Avenue to a Plea

- Full discovery can help get case resolved
- Follow up investigation can help get a plea
- Defense attorney needs to know clear picture of the case to recommend the plea
- Prosecution position of Alford Plea?

Domestic Violence

- Consider Karla's predicament
 - (a) Loves or loved him, married
 - (b) He is the bread winner
 - (c) Baby on the way
 - (d) In denial about his alcohol issues
 - (e) In denial that he is like his dad (abusive)
 - (f) Makes excuses for his behavior (Stress)

Special Responsibilities

- **A.R.P.C. 3.8 (g)**

A prosecutor with "new, credible and material evidence creating a reasonable likelihood" that a convicted defendant was innocent shall:

1. promptly disclose to the court, defendant and prosecutor if from outside the prosecutors jurisdiction, AND
2. if the conviction was from prosecutor's jurisdiction, undertake further investigation or make reasonable efforts to cause an investigation into the matter.

Commentary

- **A.R.P.C. 3.8 Commentary (7)**

"Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently."

Unrepresented Person

- **A.R.P.C. 4.3**

... The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are, or have a reasonable possibility of being in conflict with the interests of the client.

Spousal Privilege

- **Spousal Testimony:** The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of the marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

Spousal Privilege

- **Exception:** There is no privilege in a criminal proceeding in which the court determines that the spouses conspired or acted jointly in the commission of the crime.

Granting Immunity

- By Statute
- By the Court
- By actions of the prosecutor

Granting Immunity

- **National Prosecution Standards 3-4.1**
A prosecutor should not grant or request immunity for a witness without the prior approval by the chief prosecutor or his or her designee. Approval should be granted only after careful consideration of the public interest. A grant of immunity should be in writing and should describe the scope and character of the immunity granted.

Special Responsibilities

- **A.R.P.C. 3.8 (h)**
When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take appropriate steps, including notice to the victim, to set aside the conviction.

Commentary

- **A.R.P.C. 3.8 Commentary (1)**
"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and rectify the conviction of innocent persons."

Why Come Forward Now?

- Sam betrayed her trust and her deal to protect him.
- Ongoing counseling in prison
- Grandchild on the way- She must stop "The Cycle" of domestic violence in her family.

The No Contact Rule

- **A.R.P.C. Rule 4.2**
... a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Unrepresented Persons

- **A.R.P.C. Rule 4.3**
When dealing with an unrepresented person, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Special Responsibilities

- **A.R.P.C. 3.8 (h)**

When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take appropriate steps, including notice to the victim, to set aside the conviction.

Actual Innocence

- **National Prosecution Standards 8-1.8**

When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court, unless the court authorizes delay, in addition to the defense attorney or the defendant (if not represented) and seek the release of the defendant if incarcerated.

Actual Innocence

- **National Prosecution Standards 8-1.8**

Commentary: In those rare instances of credible evidence of actual innocence, these standards set forth his or her responsibilities that are consistent with the role of the prosecutor as a minister of justice.

Actual Innocence

- **National Prosecution Standards 8-1.8**
Commentary: In making the reasonable evaluation, the prosecutor must put aside concerns of personal embarrassment and pride, the possible embarrassment to law enforcement, and any other factors that would deter him or her from seeing that justice is accomplished.

Prior Representation

- **A.R.P.C. Rule 1.9**
A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.

Fairness to Opponent

- **A.R.P.C. 3.4**
A lawyer shall not:
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party...

Brady Duties

- Kyles v. Whitley, 514 U.S. 419(1995): Prosecutors must be assigned the responsibility to gauge the likely net effect of all such undisclosed evidence and make disclosure when the point of "reasonable probability" is reached. This means the prosecutor has the duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.

Prosecutor Liability

- Absolute Immunity- for initiating a charge, for presenting the prosecution case and for other actions "closely associated with the judicial process."
- Qualified Immunity- objective standard creating liability only where the official violates clearly established statutory or constitutional rights that a reasonable person would have known.

Immunity

- Pottawattamie v. McGhee
- Connick v. Thompson 131 S.Ct. 1359 (2011)

Is absolute immunity at risk?

Ex Parte Communication

- **A.R.P.C. Rule 3.5**
A lawyer shall not:
 - (a) seek to influence a judge, juror, etc., by means prohibited by law;
 - (b) communicate ex parte with such person during the proceeding unless authorized by law or a court order;

Non-Lawyer Duties

- **A.R.P.C. 5.3**
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Fairness to Opponent

- **A.R.P.C. 3.4 (c)**
A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.

Victim/Witness Issues

- **National Prosecution Standards 2-9.8**
The prosecutor should be mindful of the possibility of intimidation and harm arising from a victim's cooperation with law enforcement. The prosecutor should be aware of programs available in the jurisdiction to protect witnesses to crime, and make referrals for program participation where appropriate.

Victim/Witness Issues

- On bond- Conditions for no contact?
- Calls, following- Stalking?
- Karla's Concerns- Losing house, no job, baby coming, legit fear of Sam
- Shelter? Witness protection?

Fairness to Opponent

- **A.R.P.C. 3.4**
A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence...

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Commentary

• A.R.P.C. 3.8 Commentary (1)

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and rectify the conviction of innocent persons."

Fairness to Opponent

• A.R.P.C. 3.4

A lawyer shall not:

(d) in a pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

- Seek protective order!

Jury Selection

- **National Prosecution Standards 6-2.3**

A prosecutor should not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law.

Batson Issues

- **Batson v. Kentucky, 476 U.S. 79 (1986)**

A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must show:

Batson Issues

- (1) that he is a member of a cognizable racial group and the prosecution has exercised peremptory challenges to remove from the venire members of the defendant's race.
- (2) Defendant can rely on the strikes made to establish this. The process permits "those to discriminate who are of a mind to discriminate."

Batson Issues

- (3) These facts and any other relevant circumstances raise an inference that the prosecutor excluded venire members from the jury on the basis of race.

Batson Issues

- "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."
- "The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination."

- "One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes a mantle of power and respect to the wearer. . . No one except the judge himself is under a stricter obligation to see that every defendant receives a fair trial . . ."

Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976).
